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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re JAMES M., a Person Coming Under the
Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

AMANDA J.,

Defendant and Appellant.

F073430

(Super. Ct. No. 517179)

OPINION

APPEAL from orders of the Superior Court of Stanislaus County. Ann Q.
Ameral, Judge.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and
Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County
Counsel, for Plaintiff and Respondent.

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Amanda J., mother, appeals an order summarily denying her Welfare and Institutions Code¹ section 388 petition for modification of a prior order denying her custody of her child, James M. Mother contends the juvenile court abused its discretion in denying the petition, specifically because it based its denial on several “misunderstandings.” We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Detention

Mother has five children. Only the youngest, James, is at issue here. The older four half siblings have been in a guardianship with their maternal aunt and uncle since 2010.

In early October 2014, mother, then pregnant with James, admitted herself to a hospital in San Francisco while in premature labor. Mother identified herself as Trina S., age 42. She reported two prior caesarean section deliveries: the first due to her hepatitis C status, the result of intravenous heroin use; the second when she delivered triplets at 36 weeks. Mother tested positive for cocaine, opiates, and methamphetamine. At birth, James tested positive for cocaine and opiates and showed early signs of withdrawal, but did not have any other immediate medical concerns. James was placed in the neonatal intensive care unit and had limited contact with mother.

Mother gave an address in Modesto as her home address, but a social worker visited the address given and was told “Trina S.” did not live there. Because Trina S. received Medi-Cal from Santa Clara County, Santa Clara County Child Protective Services (CPS) was contacted. The referral to CPS stated mother reported a history of heroin abuse and that she had gone through treatment in Modesto. The referral expressed concern that the four older children mother claimed had a birth mother with an entirely different name.

¹All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

Mother did not want to identify James's father, but stated he was a responsible member of the community and was currently involved in her life. She expected him to sign James's birth certificate. Mother was unable to provide a government issued identification card.

According to mother, she was traveling with James's father to San Francisco when she went into labor, so he "dropped her off" at the hospital. Mother said James's father was her only source of support. Mother admitted smoking heroin in the amount of \$10 to \$20 packages, sold on the street, through much of her pregnancy. When asked about her source of income, she stated she does "ugly stuff." In applying for a warrant for protective custody of James, the social worker expressed suspicion that mother was using a fake name and birth date.

James was detained and placed in protective custody. Mother finally admitted her real name, but refused to explain why she used a false name at the hospital.

A Santa Clara social worker spoke to "Jonathan M.," who said he was a "friend of the family" and, although he had broken up with mother some 10 months earlier, requested a paternity test to determine if he was James's father. Jonathan M. said he would like mother to enter a rehab program.

Maternal grandmother was contacted and reported "investigators" had been to her home recently looking for mother, believed to have outstanding arrest warrants. A call to an agent at the Stanislaus County Fugitive Recovery revealed mother had a warrant for a missed court hearing. The agent believed Jonathan M. was prostituting mother.

A section 300 petition was filed October 8, 2014, in Santa Clara County, naming mother as Amanda J., also known as Amanda L., also known as Trina S., and father as Sean M., also known as Jonathan M. (father). The petition alleged mother had a 20-year history of heroin use, including while pregnant, placing James at risk of harm. It further alleged prior welfare intervention with voluntary services, which failed and resulted in the older siblings being placed in a probate guardianship with a maternal aunt since 2010. The petition alleged mother had a criminal history, including several felony convictions

for petty theft with a prior, possession of a controlled substance, burglary and robbery. Allegations against father included that his whereabouts were unknown and his criminal convictions included several for driving under the influence of alcohol.

Neither mother nor father was present at the detention hearing. Father refused to provide any information, including his address, until paternity was established. Jurisdiction was set for October 27, 2014.

Jurisdiction

The report prepared in anticipation of jurisdiction gave some background information on mother, stating she tested positive for marijuana in 2007 at the birth of her triplets. At that time, she reported a five-year heroin abuse history. The report also referenced a general referral filed in 2009 in which mother was reported to be using drugs and that she had three criminal charges in Washington State between 2000–2001 for drugs and prostitution. These allegations were substantiated and led to voluntary services and voluntary placement of her older children with relatives.

The report recommended that, after jurisdiction findings were made in Santa Clara County, the matter be transferred to Stanislaus County. Neither parent appeared for the jurisdiction hearing on October 29, 2014.

On November 17, 2014, father filed notice of his mailing address, his true name, and a waiver of his right to a hearing on the petition. The juvenile court amended the petition according to proof, striking the allegation that father's whereabouts were unknown. It sustained the remainder of the petition and transferred the matter to Stanislaus County for disposition.

Transfer-in Hearing

On January 5, 2015, the Stanislaus County Juvenile Court accepted the transfer from Santa Clara County. By this time, mother was in custody and being transferred to Chowchilla State Prison. Counsel was appointed for both mother and father and disposition set for February 9, 2015.

Disposition

The report prepared in anticipation of disposition recommended services be denied mother due to her lengthy prison sentence (§ 361.5, subd. (e)(1)) and to father because he was an alleged father only (§ 361.5, subd. (a)). Mother had been arrested on November 17, 2014, on outstanding warrants and was serving a five-year prison sentence. Testing of DNA found father to be James's biological father by a 99.99 percent probability, but he had not signed James's birth certificate. Neither parent had visited James since his release from the hospital to foster care. James was reported to be developmentally behind, but making slow improvement.

The report stated mother, actually age 39, had been using heroin for 20 years and had admitted drug use while pregnant with James. She tested positive for cocaine, methamphetamine, and opiates at James's birth. Mother had not parented her other four children since 2010, when they were placed in guardianship. The maternal aunt who had guardianship of the other children stated she was unable to take James into her home as well.

Mother and father reportedly met in a drug program in 2012. Numerous attempts to communicate with father proved unsuccessful. According to mother, when she went into labor, father dropped her off at the hospital but did not stay. He had never visited James and provided no supplies or support. He failed to keep multiple appointments with the social worker.

A contested disposition hearing was held March 11, 2015. Mother's counsel reported that mother completed a parenting class in Stanislaus County in December of 2014. It was reported that, prior to the hearing, father signed a declaration of paternity. The agency submitted an offer of proof that father did not have a relationship with James, had not wanted to exercise his parental rights until proof of paternity, attended only half of the provided visits, and missed multiple assessment appointments. He tested positive for methamphetamine on March 2, 2015, but denied recent drug use. He presently had a criminal case pending for possession of a controlled substance.

The juvenile court declared James a minor dependent, removed him from the custody of both mother and father, and ordered reunification services for father, “now presumed father.” It denied services for mother, finding it would be detrimental to provide mother services as she had a five-year prison sentence that was “far in excess of the six months of reunification services.” In its decision, the juvenile court also noted mother’s lengthy self-admitted history of heroin abuse, her previous CPS history, and her unsuccessful voluntary service history with four other children. A three-month review hearing was set for June 4, 2015.

Three-month Review

The report prepared in anticipation of the three-month review stated father did not participate in services for the first three months. He was frequently late for visits or left without a visit. He left a threatening voice message for the social worker, including advising her “to keep [her] distance from [him].” A clinical assessment and evaluation for anger management was added to father’s case plan at the three-month review. A six-month review was set for September 3, 2015.

Six-month Review

The report prepared for the six-month review recommended termination of services for father, as he had not begun any component of the case plan and visited James only sporadically. The agency labeled father “one of the most difficult clients” it had had.

Following a September 17, 2015, contested hearing, the juvenile court terminated services for father, finding he had completed none of the components of his reunification plan. A section 366.26 permanency planning hearing was set for January 21, 2016. The court also granted James’s foster parents’ request to be designated de facto parents.

Mother appeared via telephone and asked counsel, at the end of the hearing, to file a notice of intent to file an extraordinary writ, which counsel did. No petition for writ was filed by mother or counsel and the matter was dismissed as abandoned by this court on November 16, 2015.

Section 388 Petition

On December 18, 2015, mother filed a section 388 petition requesting the juvenile court restore custody and place James with her. Mother claimed the proposed order would benefit James because he “deserves to have a meaningful parent/child relationship with his mother, siblings, and extended family. James has a relationship with his siblings.... Also, James’[s] health would be benefitted if his health care providers could continue to get information from [mother] about family health issues.” Mother listed a number of things she had done while in prison, which she considered a change of circumstances warranting the proposed order. Mother included numerous attachments to the petition.

On December 23, 2015, the juvenile court denied the section 388 petition without a hearing, indicating the petition did not state a change of circumstances or demonstrate the requested order would promote James’s best interest.

Section 366.26 Hearing

The report prepared in anticipation of the section 366.26 selection and implementation hearing recommended termination of parental rights and a permanent plan of adoption for James. The report stated the de facto parents wished to adopt him. The de facto parents reported close contact with the paternal grandmother, who had visited James several times. Neither mother nor father had had any contact with James during the reporting period.

At the January 21, 2016, contested section 366.26 hearing, mother acknowledged she last saw James when he was four days old, but that James had had five or six visits with his siblings. She submitted photographs of a visit between James, at age one, with his four half siblings. Mother recognized James in the photographs as “hers” because of a resemblance to herself. Mother had never observed James interact with his siblings, but had heard about the interaction through letters and telephone calls from her mother, sister, and her older children. Mother’s counsel argued for application of the sibling exception to adoption and requested guardianship as a permanent plan.

The juvenile court found mother had not met her burden of establishing the sibling relationship exception. Mother's and father's parental rights were terminated and a permanent plan of adoption ordered.

DISCUSSION

Mother claims the juvenile court erred when it summarily denied her section 388 petition. Before we reach the merits of mother's claim, we first address whether the claim is properly before us on appeal.

Appealability

Mother's trial counsel filed a notice of appeal on March 21, 2016, stating she was appealing from the January 21, 2016, section 366.26 order terminating parental rights. But, on appeal, mother raises no issues stemming from the findings and order after the section 366.26 hearing. Instead, she raises only issues related to the denial of her section 388 petition, and the notice of appeal contains no reference to the December 23, 2015, order denying the section 388 petition.

We routinely deem the notice of appeal amended to include the additional section 388 ruling based on the following rationale:

“First, the denial of such a section 388 petition is an appealable order. (§ 395.) Second, the parent's notice of appeal is entitled to our liberal construction. (*Vibert v. Berger* (1966) 64 Cal.2d 65, 67.) Third, appellate jurisdiction to review an appealable order depends upon a timely notice of appeal. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 340.) Fourth, the notice of appeal would be timely as to the denial of the parent's section 388 petition, provided the trial court denied the parent's section 388 petition within 60 days of when the parent filed the notice of appeal. (Cal. Rules of Court, rule 2 [now rule 8.104].) And, finally, respondent is not prejudiced. (*Vibert v. Berger, supra*, 62 Cal.2d at p. 67.)” (*In re Madison W.* (2006) 141 Cal.App.4th 1447, 1450.)

Here, mother concedes her notice of appeal, filed March 21, 2016, was well past the deadline for appealing the December 23, 2015, order, but she contends there is no proof in the record that this denial was ever served on her. Mother argues, “Because the order denying the petition was never ‘entered’ under the law, the Notice of Appeal filed on

March 21, 2016, must be found to timely include the court's summary denial of the petition in this case."

Respondent was also unable to locate a proof of service for the denial order, but states mother was well aware that the juvenile court denied the petition. As noted by respondent, the contents of the section 366.26 report, served on mother and her counsel December 31, 2015, included a statement as to why the juvenile court denied the petition on December 23, 2015. In addition, at the section 366.26 hearing on January 21, 2016, neither mother nor her counsel protested or sought to add the section 388 petition to the proceedings, although mother did testify during the section 366.26 hearing to some facts the juvenile court stated were pertinent to a section 388 petition "which unfortunately this court denied."

In any event, even if we construe the notice of appeal to include the section 388 petition, we find no abuse of discretion on the part of the juvenile court in summarily denying the petition.

Mother's Section 388 Petition

Mother's section 388 petition, filed December 18, 2015, requested the juvenile court restore custody of James to her. Mother claimed the proposed order would benefit James because he "deserves to have a meaningful parent/child relationship with his mother, siblings, and extended family. James has a relationship with his siblings.... Also, James'[s] health would be benefitted if his health care providers could continue to get information from [mother] about family health issues." Mother listed a number of things she had done while in prison, which she considered a change of circumstances warranting the proposed order. For each claim, she included an attachment.

Specifically, mother alleged that, while incarcerated, she completed "a number of positive steps to improve herself including engaging in programs and maintaining contact with her other children." In support of this claim, mother included a handwritten document stressing her "Positive Points," including that she was addressing her addiction through the substance abuse program (SAP) and attending AA/NA meetings; she was

involved in several self-help groups; she was attending college classes; she had “frequent and regular” contact with her other children, through calls and letters; she was deemed nonviolent in prison and she drug tested negative for “almost a year”; she was advocating for relief from her prior criminal record through Proposition 47; and she was currently housed in a “re-entry based facility.” Mother attached documentation of her attendance at various meetings and programs, including AA/NA, parenting classes, yoga classes, and tai chi classes.

Mother attached a letter from her corrections counselor stating mother had been on the waiting list for the SAP since May 13, 2015. Also attached were three petitions dated August 18, 2015, directed to Stanislaus County Superior Court seeking to have three felony convictions reduced to misdemeanors. But the petitions were not file-stamped, nor was there any documentation or notation indicating a ruling on the petitions.

Mother attached a “General Affidavit” signed by 89 people, purportedly her peers, indicating their belief that it would be in James’s best interest to be placed with mother. Mother attached photographs of James taken when he was three months old during a visit with his siblings. She also included a handwritten list of family medical history and a list of James’s extended family members.

On December 23, 2015, the juvenile court denied the section 388 petition without a hearing, checking the box indicating the petition did not state a change of circumstances or demonstrate the requested order would promote James’s best interests. The juvenile court attached a written statement in which it stated it had no reason to doubt mother had taken a “plethora of programs aimed at improving herself,” but that the petition did not state a prima facie case that the request would be in James’s best interests. As reasoned by the juvenile court, James was only a few days old when he was removed from mother and had lived with his de facto parents for 10 of the past 14 months. In addition, the juvenile court noted the “escape mechanism” of section 388 “after reunification efforts have ceased is only available when a parent has completed a reformation before parental rights have been terminated.” The juvenile court noted, “There is no evidence presented

by ... mother of a completed reformation,” further noting mother’s 20-year heroin abuse and the drugs in her and James’s system at the time of his birth. The juvenile court opined, “Such a long history of substance abuse requires more than a year of being clean and sober, especially in consideration of the fact that all of the clean and sober time has been during her period of incarceration.” The juvenile court also noted mother was incarcerated and James “should not be required to wait for permanence,” but instead that James, “who has been out of his mother’s care virtually since his birth, needs and deserves, permanency and stability now.”

Applicable Law and Analysis

“A party may petition the court under section 388 to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and (2) the proposed change is in the child’s best interests.” (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 257.) “A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child’s best interests.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

To obtain a full hearing, a parent must make a prima facie showing of both of these elements. (*In re Jackson W., supra*, 184 Cal.App.4th at p. 257.) “The petition must be liberally construed in favor of its sufficiency.” (*Ibid.*) ““The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.’ [Citation.]” (*Id.* at p. 258.) “[A] hearing must be held only if it appears the best interests of the child may be promoted by the proposed change of order.” (*Id.* at pp. 259-260.) When determining whether the petition makes the necessary prima facie showing, “the court may consider the entire factual and procedural history of the case.” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189; see *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

We review the summary denial of a section 388 petition without an evidentiary hearing for abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460.) “‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ [Citation.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) “‘The denial of a section 388 motion rarely merits reversal as an abuse of discretion.’ [Citation.]” (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

Mother submitted a substantial volume of material with her section 388 petition, but only a very small portion of that material was relevant to the juvenile court’s analysis and determination. Although mother insisted that she showed sufficient evidence of changed circumstances, the evidence shows, at best, changing circumstances, which is insufficient. (*In re Casey D., supra*, 70 Cal.App.4th at p. 47.) For instance, while mother submitted documents showing she participated in AA/NA, there is no indication how far she is in the 12-step program. Nor is there any indication she actually ever went through any type of drug rehabilitation. Instead, the document provided by mother states she was on a waiting list for, but had not yet begun, the prison-based SAP. Mother reported she had been clean and sober for less than one year and, as noted by the juvenile court, all of that time had been while she was in prison under a much more structured and monitored basis than had she been on her own.

We disagree with mother that there is insufficient evidence in the record of mother’s long-standing heroin use. To the contrary, the record is more than adequate on this issue. As stated in the dependency petition, when mother was admitted to the hospital in labor with James, she reported to medical staff that she had two prior caesarean section deliveries—the first in 2003—due to her hepatitis C status she contracted as the result of using intravenous heroin in her 20’s. At the time of James’s birth, mother was 39 and she admitted to social workers that she smoked heroin during her pregnancy. This is certainly evidence of long-term heroin use.

Mother did not refute these allegations at either the dependency or jurisdiction hearings. While mother correctly points out she was not present at either hearing as both took place in Santa Clara County, the reason for this location was a direct result of mother's lying to the hospital and social worker about her identity.

In any event, by the time of disposition, mother was in custody and appeared at the hearing, but she still made no attempt to refute the multiple statements in the disposition report stating she had used heroin for 20 years. Nor did she appeal from the jurisdiction and disposition findings on the ground that there was insufficient evidence to support the sustained allegation that mother "has been using heroin for twenty years, including smoking heroin twice per day throughout her pregnancy." The true finding as to this allegation is final and may not be challenged in this appeal. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1156.)

We also agree with the juvenile court that mother did not make a prima facie showing that placing James in her custody would be in the child's best interest. First and foremost, mother had no relationship with James, who was at the time of the section 388 petition 14 months old. Mother last saw James when he was four days old. And while she was not arrested until James was six weeks old, mother made no effort to visit him in foster care prior to her incarceration. At the time of her petition, James had been with his current caretakers, and proposed adoptive parents, for 10 of his 14 months. He was bonded with his foster parents and had no relationship with mother. Any relationship James had with his half siblings was facilitated by his caretakers, not mother.

We dispute mother's contention that the juvenile court erred in summarily denying her petition, in part, based on a "misunderstanding" that her incarceration prevented her from having custody. We disagree. The evidence that placing James with mother was not in his best interest was more than sufficient. In addition, the brochure for the Community Prisoner Mother Program mother attached to her section 388 petition states that in order to be eligible to have a child placed with a mother in prison, the mother must have "legal custody" of her child. Because a child who is a dependent of the juvenile

court is in the legal custody of the court, it would arguably be necessary for the court to not only grant mother physical custody of James, but to dismiss jurisdiction for her to have legal custody. (*In Robert A.* (1992) 4 Cal.App.4th 174, 184 [when a dependent child is ordered removed from parental custody under § 361, the agency gains both legal and physical custody of the child].) This would place James in jeopardy and would be an abuse of discretion.

We find no error on the part of the juvenile court in summarily denying mother's section 388 petition and reject her contention to the contrary.

DISPOSITION

The order of the juvenile court denying mother's section 388 petition is affirmed. Since mother makes no independent claims as to the termination of parental rights order, that order is affirmed as well.

FRANSON, Acting P.J.

WE CONCUR:

PEÑA, J.

SMITH, J.